LIM CHON JET & ORS

v.

YUSEN JAYA SDN BHD

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
DAVID WONG DAK WAH J
[CIVIL CASE NO: K22-79-2006-I]
28 JANUARY 2011

CONTRACT: *Agreement - Sale and purchase agreement - Breach - Allegations of - Late delivery of houses - Whether defendant in breach of statutory duties - Whether plaintiffs proved loss and damages suffered as a result of defendant's breach - Whether plaintiffs entitled to quantifiable and unquantifiable losses - Housing (Control and Licensing of Developers) Rules 1980 (Sabah), r. 12(1)(o), (q) & (r)*

CONTRACT: *Illegality - Sale and purchase agreement - Terms and conditions - Whether clauses in SPA contravened r. 12(1)(o) & (r) of the Housing (Control and Licensing of Developers) Rules 1980 (Sabah)*

CONTRACT: *Breach - Damages - Quantum of damages - Assessment of - Quantifiable and unquantifiable loss - Calculation of - Whether accepted*

The plaintiffs were purchasers of various residential houses in Taman Bukit Saujana situated at Jalan Bantayan, Off Jalan Tuaran, Mile 3 1/2, Kota Kinabalu, Sabah ('project'). After taking possession of their houses, defects were detected by them and in view of the developer's failure to remedy those defects, this suit was taken out by the plaintiffs against the developer/defendant. The damages claimed by the plaintiffs were for liquidated ascertained damages ('LAD') for late delivery of the houses under cl. 18(2) of the sale and purchase agreement ('SPA'), damages for breach of contract, damages for breach of statutory duty, damages under the tort of negligence, damages for distress and inconvenience and damages for loss of amenity or diminution in the value of the houses. The defendant denied the claims and averred that there had not been any breach of duties, contractual or otherwise, on their part and that the plaintiffs had failed to prove the damages they had allegedly suffered. The sole issue that arose for the determination before this court was whether the defendant had been in breach of its duties which had entitled the plaintiffs to claim damages against them.

Held (allowing plaintiffs' action with costs):

(1) The Housing (Control and Licensing of Developers) Rules 1980 had been a piece of legislation enacted and aimed specifically at protecting purchasers of houses and as such, unless a formal waiver of compliance with the Rules had been given by the Controller, any attempt to avoid the rules would be invalid. Further the weight of authorities had been against the defendant. Thus, cls. 18(1) and (3) of the SPA had been invalid in so far as they had contravened r. 12(o) and (r) of the Housing (Control and Licensing of Developers) Rules 1980. (paras 12 & 14)

(2) There had been a basic flaw in the architect's certificate dated 17 December 2004 as the architect had not been called to prove the truth of the contents of the certificate. Hence it had been a useless piece of evidence and the defendant could not rely on it. (para 15)

(3) Since there had not been any specific clause in the SPA which had provided for disputes to be referred to arbitration and since it would have been an affront to the principles of natural justice and fairness if the defendant's architect were to act as the arbitrator as he had, so to speak, been on the defendant's payroll, the plaintiffs had been fully entitled to challenge the defendant's architect's certificates in this proceedings. Unfortunately, the defendant had chosen not to call the architect to rebut the plaintiffs' evidence and an adverse inference would be drawn against them. Part of the provisions of cl. 23 of the SPA had contravened r. 12(1)(q) of the Housing (Control and Licensing of Developers) Rules 1980. Based on the authorities submitted, the evidence of PW1 and PW2 would be accepted as the defendant had not shown that their evidence had been inherently incredible and as such the plaintiffs had proven on a balance of probability their claim of the defendant's liability. (paras 21, 29, 30 & 33)

(4) On the plaintiffs' claim for quantifiable loss, the plaintiffs had relied on P5 authored by PW3, a professional registered quantity surveyor. His evidence and report had not been seriously challenged by the defendant and applying the principles as set out in this case, the quantum of damages as calculated by PW3 would be accepted. (para 39)

(5) PW2 had testified that the plaintiffs' house had been built with defects which could not be remedied unless completely demolished and rebuilt from the ground up. This had not been challenged by the defendant. In proving the quantum of loss, the plaintiffs had relied on the evidence of PW4 who had authored P6. PW4 in his assessment of quantum had applied the diminution value of 30%. There had not been an error in his calculation. (paras 40 & 44)

(6) There had not been any rebuttal by the defendant on the cost of investigation and since these fees had been reasonable professional fees, it would be accepted as legitimate expenditure on the part of the plaintiffs in pursuing this case. (paras 40, 42 & 46)

(7) The defendant's contention that the renovations carried out by the plaintiffs to their houses should not have had an effect on the valuation of the quantum of damages, although logical, had not been supported by any evidence. The reality had been that the relevant authority had not viewed these renovations as a major concern and it had appeared that these illegal structures could be legalized with a subsequent application for approval as testified to by PW10 who had been the engineer of DBKK. Again there had not been any evidence to show that DBKK had required illegal structures on houses to be dismantled in Kota Kinabalu *ie*, subsequent purchasers of these renovated houses had not been subject to any risk that DBKK or any other relevant authority would require them to dismantle the illegal structures. Thus, the defendant's contentions could not be accepted. (para 47)

Case(s) referred to:

Applegate v. Moss [1971] 1 All ER 747 ***(refd)***

Hadley v. Baxendale [1854] 156 ER 145 ***(refd)***

Mahtani & Ors v. Kiaw Aik Hang Land Pte [1995] 1 SLR 168 ***(refd)***

Mclean v. Weir [1977] 2 ACWS 593 ***(refd)***

Raja Lob Sharuddin Raja Ahmad Terzali & Ors v. Sri Seltra Sdn Bhd [2008] 2 CLJ 284 CA ***(refd)***

Sea Housing Corporation Sdn Bhd v. Lee Poh Choo [1982] CLJ 355; [1982] CLJ (Rep) 305 FC ***(refd)***

Takako Sakao v. Ng Pek Yuen & Anor [2010] 1 CLJ 381 FC ***(refd)***

Teh Khem On & Anor v. Yeoh & Wu Development Sdn Bhd & Ors [1996] 2 CLJ 1105 HC ***(refd)***

Legislation referred to:
Contracts Act 1950, ss. 24(b), 74
Housing (Control and Licensing of Developers) Rules 1980 (Sabah), r. 12(1)(o), (q), (r)

Other source(s) referred to:
Keating on Building Contracts, 7th edn, 2001, pp 135 & 136

For the plaintiff - Alex Decena (Wilson Lai & Christina Liew with him); M/s CJ Liew & Co
For the defendant - Ronny Cham (Grace Chow with him); M/s Ronny Cham & Co

Reported by Sharmini Pillai

JUDGMENT

David Wong Dak Wah J:

Proceeding

[1] The plaintiffs' claim is for damage and loss against the defendant on the ground that the residential houses which they have purchased from the defendant were defective and the delivery of possession of the same was late. The claims are denied by the defendant on the ground that there was no breach of duties, contractual or otherwise, on their part and in any event the plaintiffs had failed to prove damages they have suffered.

Background Facts

[2] There are 46 plaintiffs in this case and they are the purchasers of the various residential houses in a housing scheme known as Taman Bukit Saujana Springfields situated at Jalan Bantayan, Off Jalan Tuaran Mile 3 1/2, Kota Kinabalu, Sabah (project). Summary of the names of the 46 plaintiffs, particulars of their respective residential houses, and the particulars of their sale and purchase agreements (sale and purchase agreements) are set out in 'Annexure A' annexed to the amended statement of claim dated 21 August 2009. After taking possession of their residential houses, defects were detected by the plaintiffs and in view of the developer's failure to remedy those defects; this suit is taken out against the defendant/developer, Yusen Jaya Sdn Bhd.

[3] The damages claimed by the plaintiffs are as follows: A

(i) Liquidated and ascertained damages ("LAD") for late delivery of the houses under cl. 18(2) of the sale and purchase agreements;

(ii) Damages for breach of contract; B

(iii) Damages for breach of statutory duty;

(iv) Damages under the tort of negligence;

(v) Damages for distress and inconvenience; C

(vi) Damages for loss of amenity or diminution value of houses.

Claims For Liquidated Damages For Late Delivery Of Possession Of The Houses D

[4] This issue revolves around the interpretation of cl. 18 of sale and purchase agreement which reads as follows:

> (1) Subject to Clause 18(3) hereof and/or to any extension of time as may be allowed by the Controller, the said Property E shall be completed by the Developer within twenty-four (24) calendar month from the date of this Agreement. Completion in Clause 18 herein shall mean practical completion duly certified by the Developer's Architect and/or Consultant for the purpose of application to the Appropriate Authority for F the Certificate of fitness for Occupation.
>
> (2) If the Developer fails to complete the said Property within the stipulated period, the Developer shall pay to the Purchaser liquidated damages to be calculated from day to day at the rate of eight per centum (8%) per annum of the G purchase price commencing immediately after the expiry of the said twenty four (24) months period to the date the Developer submits its application to the Appropriate Authority for the Certificate of Fitness for Occupation Provided always that no indemnity shall be payable H hereunder unless the whole of the purchase price shall have been paid to or settled with the Developer.
>
> (3) Notwithstanding any provisions herein contained to the contrary (if any), it is hereby expressly agreed by the parties hereto that the Developer shall not be liable to the Purchaser I for any failure on its part to fulfill any term of this

A Agreement, if such fulfillment is delayed, hindered or prevented by circumstances beyond the control of the Developer such as riot, civil commotion, inclement weather conditions and any act of God causing the disability of the contractors and sub-contractors employed by the Developer either commencing, carrying on or completing their work or failure to obtain any necessary sanction or approval from the Appropriate Authority or any other circumstances of whatsoever nature, beyond the control of the Developer.

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[5] Counsel for the defendants submits that cl. 18 does not C provide that only the Controller is the sole authority in granting extension of time of completion of the houses. In the words of counsel, this is how it sounds:

Therefore, those words, "Subject to Clause 18(3) hereof and/or to any extension of time as may be allowed by the Controller" D must simply be interpreted or construed to mean that the Defendant under Clause 18(1) of the SPA have two options:

Option 1 the Defendants can Either opt for the provision of Clause 18(3) OR extension of time as may be allowed by the Controller; and E

Option 2 the Defendants can opt for the provision of Clause 18(3) AND extension of time as may be allowed by the Controller.

F This interpretation gives effect to the words "and/or" simply, plainly, and grammatical and ordinary meaning.

[6] What the defendants have done in this case is to rely on a letter dated 17 December 2004 issued by the architect allegedly pursuant to cl. 18(3).

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[7] That letter states as follows:

Considering the overall impact of the aforesaid circumstances which were beyond the developer's control, we are of the opinion that the developer is entitled to an extension of time of six (6) H months to complete the development and accordingly the practical completion of the development would be delayed by the said period.

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[8] With that extension by the architect, the defendant contend that there has not been any delay in the delivery of possession of the houses to the plaintiffs. A

[9] Counsel for the plaintiffs attacked the validity or legality of cl. 18 rather the merit of the interpretation given by the defendants. It is contended that cls. 18(1) and 18(3) are illegal by virtue of s. 24(b) of the Contracts Act 1950 on the ground that they contravene r. 12(1)(o) and (r) of the Housing (Control and Licensing Developers) Rules 1980 which read as follows: B C

> 12(1) Every contract of sale shall be in writing and shall contain within its terms and conditions provisions to the following effect, namely:
>
> (o) provisions specifying the date of delivery of the vacant possession of the housing accommodation to the purchaser which date shall not be later than 24 months after the date of signing of the contract of sale; D
>
> (r) provisions binding on the licensed housing developer that he shall indemnify the purchaser for any delay in the delivery of the vacant possession of the housing accommodation. The amount of indemnity shall be calculated from day to day at the rate of not less than eight per centum per annum of the purchase price commencing immediately after the date of delivery of vacant possession as specified in the contract of sale; E F

[10] In respect of cl. 18(1), the offending part is the definition of 'practical completion' with reference to the architect's certification. For cl. 18(3), the offending part is the exclusion of liability of the defendant for delay 'beyond the control' or 'any other circumstances of whatsoever nature beyond the control of the developer'. G

[11] Having read the authorities supplied by counsel for the plaintiffs, I have no problem in sustaining their contention for the simple reason that the Housing (Control and Licensing of Developers) Rules 1980 is a piece of legislation enacted and aimed specifically at protecting purchasers of houses and as such unless a formal waiver of compliance with the Rules is given by the Controller, any attempt to avoid the Rules shall be invalid. H I

[12] Further the weight of authorities is against the defendant. Suffice for me to refer to the case of *Sea Housing Corporation Sdn Bhd v. Lee Poh Choo* [1982] CLJ 355; [1982] CLJ (Rep) 305 which is a Federal Court's decision. In that case, it also concerned a sale and purchase agreement for a building and there was a term of the agreement that the building should be completed within a period of eighteen months from the date of the agreement. There was also another term (cl. 32) which allows the developer to claim exemption of liability for late delivery if the delay was caused by circumstances beyond their control. The building was only completed some twenty three months after that date. Clause 18(3) is similar to cl. 32 in *Sea Housing* case. The issue there is whether the developer can claim exemption under cl. 32. Suffian LP delivering the judgment of the Federal Court said this:

> Thus, it is clear that only terms and conditions designed to comply with the requirements of the rules that may be inserted in a contract of sale of land that is governed by the Act and rules, and that on the contrary terms and conditions which purport to get round the Act and rules so as to remove the protection of home buyers may not be so inserted.

[13] The Lord President also held that it was open to the developer to try and persuade the Controller of Housing to modify the rigors of para. (o) and (r) of r. 12(1) of the Housing (Control and Licensing of Developers) Rules 1980 but in the absence of waiver or modification by the Controller, cl. 32 is void and therefore the developer is liable in damages for the delay in completion.

[14] Accordingly, I hold that cls. 18(1) and (3) to be invalid in so far as they contravene rr. 12(o) and (r).

[15] As for the architect's certificate dated 17 December 2004, there is a basic flaw and that is, the architect was never called as a witness to prove the truth of the contents of the certificate. Hence, it is a useless piece of evidence and in view of my conclusion on the effect of the Housing (Control and Licensing of Developers) Rules 1980; the defendant cannot rely on it.

[16] The plaintiffs have listed the amount of compensation under this item of claim and no attempt has been made by the defendant to dispute the accuracy of the same. That being the case, I order the defendant to pay the respective plaintiffs, the compensation as set out by the plaintiffs which is as follows:

Plaintiffs No.	Lot No.	Purchase Price	Date of S&P	Expected date of delivery	Completion Date	Days of Delay	LAD (RM)
1st & 2nd	2	388,800.00	22.03.2003	22.03.2005	01.07.2005	102	8,692.44
3rd & 4th	3	413,800.00	18.12.2002	18.12.2004	01.07.2005	196	17,777.20
12th	22	388,800.00	10.01.2003	10.01.2005	01.07.2005	173	14,743.06
13th	23	378,860.00	31.10.2002	31.10.2004	01.07.2005	244	20,261.76
15th	27	395,960.00	16.05.2003	16.05.2005	01.07.2005	47	4,079.13
16th	31	438,800.00	10.01.2003	10.01.2005	01.07.2005	173	16,639.14
17th	32	430,160.00	20.12.2002	20.12.2004	01.07.2005	194	18,290.32
18th & 19th	34	420,000.00	28.02.2003	28.02.2005	01.07.2005	124	11,414.20
20th	37	420,000.00	20.12.2002	20.12.2004	01.07.2005	194	17,857.70
21st	39	412,000.00	20.12.2002	20.12.2004	01.07.2005	194	17,518.20
22nd	40	407,360.00	18.11.2002	18.11.2004	01.07.2005	226	20,177.28
23rd & 24th	41	428,800.00	06.03.2003	06.03.2005	01.07.2005	118	11,089.64
26th & 27th	45	268,800.00	20.12.2002	20.12.2004	01.07.2005	194	11,430.48
28th	51	255,360.00	20.12.2002	20.12.2004	01.07.2005	194	10,858.18
30th	53	255,360.00	10.01.2003	10.01.2005	01.07.2005	173	9,682.81
31st	54	268,800.00	20.12.2002	20.12.2004	01.07.2005	194	11,430.48
34th & 35th	59	318,800.00	29.10.2002	29.10.2004	01.07.2005	246	17,188.02
36th	68	228,800.00	23.12.2002	23.12.2004	01.07.2005	191	9,578.65
37th	74	217,360.00	15.11.2002	15.11.2004	01.07.2005	229	10,909.56
38th, 39th & 40th	78	263,800.00	09.01.2003	09.01.2005	01.07.2005	174	10,060.68
43rd	90	288,800.00	21.11.2002	21.11.2004	01.07.2005	223	14,115.90
44th & 45th	91	274,360.00	10.01.2003	10.01.2005	01.07.2005	173	10,402.49
52nd	98	228,800.00	15.11.2002	15.11.2004	01.07.2005	229	11,484.35
TOTAL							**305,681.67**

A **Damages For Breach Of Agreement**

Plaintiffs' Case

[17] The main plank of the plaintiffs' case is premised on cl. 12 of the sale and purchase agreements which reads as follows:

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> Materials And Workmanship To Conform To Description
>
> The said Property shall be constructed in a good and workmanlike manner in accordance with the specifications described in the Fifth Schedule hereto and in accordance with such Building Specifications Plans approved by the Appropriate Authority or other competent authority which specifications and plans have been shown to and accepted by the Purchaser as he hereby acknowledges. No changes thereto or deviations therefrom shall be made except such as may be required by the Appropriate Authority or as certified by the Developer's Architect / Consultant as expedient and necessary. The costs of such changes shall be borne by the Developer without any claim against the Purchaser.

C

D

[18] Counsel for the plaintiffs submits that the defendant had breached cl. 12 on the grounds that the defendant had obtained certificate of fitness for occupation using "As-Built Plans" instead of the original approved plans and also the defendant had carried out defective works in the construction of the houses. In proving their cases, they rely on the evidence of two experts in PW1 and PW2 who are experienced architect and engineer respectively. There is no challenge to the expertise of PW1 and PW2 by the defendant. In any event I am satisfied that with their experience and qualifications, they should be treated as experts in their fields.

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[19] The evidence of PW1 is contained in exh. P1 - the inspection report prepared by PW1, exh. P2 - the CR-ROM contained photographs showing all the defects and exh. P3 - the revised inspection report with additional summary prepared by PW1. The main complaints from the evidence of PW1 can be said to be these:

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(a) The defendants had used "As-Built Plans" instead of the Original Approved Plans.

(b) And because of the use of the "As-Built Plans" by PW1, there were several omissions as follows:

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(i) The GI Sheet commonly called a flat metal sheet was omitted for the lower level roof for example car porch.

(ii) Non slip tiles in wet kitchen were omitted and cements screed was provided instead.

(iii) Concrete bench top and kitchen cabinet in internal kitchen and the cooking bench top at the wet kitchen outside were omitted.

(iv) The parquet floor which is the timber floor for staircase were omitted and replaced with glaze ceramic tiles.

(v) Wire mesh reinforcement commonly known as 'exmet' (it is a wire mesh reinforcement to be laid every fourth layer of a brick wall) was not laid in.

[20] As for the evidence of PW2, it is contained in exh. P4 and this is what is stated in the assessment and appraisal:

7.0 Assessment and Appraisal

Based on the findings of the condition survey and material testing reports, the defects and related problems can be grouped into six categories. Namely,

a. Inferior concrete quality

b. Moisture ingression

c. Structural Cracks

d. Corrosion of steel reinforcement

e. Non-compliance

f. Ground settlement

[21] The defendant have chosen not to rebut the evidence of both PW1 and PW2 despite invitation by the court to do so. In view of this non rebuttal, counsel for the plaintiffs submits that the evidence of PW1 and PW2 ought to be accepted by the court and refers the court to a Canadian case of *Mclean v. Weir* [1977] 2 ACWS 593, [1977] 3 CCLT 87, 101, where the British Columbia Supreme Court through the judgment of Gould J said as follows:

The Plaintiff had adequate opportunity, and was virtually invited, to call medical evidence in rebuttal – see excerpts from transcript above. For the Plaintiff the most advantageous of all times in this trial for medical evidence was in rebuttal, after all the defence's experts had been heard. No rebuttal medical evidence was offered. Instead, the Court was invited, urged, to speculate against the unanimous evidence of exceptionally well qualified experts to bring in a finding contrary to their opinions. It is true that the Court may accept in whole or in part or reject in whole or in part the evidence of any witness, on the respective grounds of credibility or plausibility, or a combination of both. But in technical matters, unlike lay matters within the traditional intellectual competence of the Court, it cannot substitute its own medical opinion for that of qualified experts. The Court has no status whatsoever to come to a medical conclusion contrary to unanimous medical evidence before it even if it wanted to, which is not the situation in this case. If the medical evidence is equivocal, the Court may elect which of the theories advanced it accepts. If only two medical theories are advanced, the Court may elect between the two or reject them both: it cannot adopt a third theory of its own, no matter how plausible such might be to the Court. There is an evidentiary bar to opinion evidence on technical subjects from non-qualified witnesses, and an equally rigid bar against judges coming to conclusions on technical matters (other than domestic and constitutional law) founded on their own opinions rather than on evidence from qualified witnesses. (emphasis added)

[22] The law is no different on our own shores and this can be seen in the Federal Court judgment in the case of *Takako Sakao v. Ng Pek Yuen & Anor* [2010] 1 CLJ 381 where Gopal Sri Ram FJ held at p. 398-399 as follows:

Four main points arise in this appeal. First, whether the High Court's evaluation of the appellant's evidence was correct, in particular as to the amount of her contribution to the purchase price. Second, what rights, if any did the appellant acquire under the terms of the mutual understanding between her and the first respondent? Third, whether the appellant may enforce her rights, if any, against the second respondent. And fourth, whether s. 433B of the Code applies to the instant case. Taking the first issue, it is significant that in the present instance the first respondent did not attend court nor give evidence nor take any part in the case. All she did was merely to put forward arguments on why the appellant's *caveat* ought to be removed. She could have, if she wished, given evidence and challenged the appellant's evidence. But as already noted, she refrained from doing that. On the facts of this case, there were two persons who were privy to

the terms of the arrangement in question and the details of the payments made and the purpose for which they were made: the appellant and the first respondent. The appellant took the witness stand and gave her evidence on the terms of the arrangement and about the sums of money she had provided and the purpose for which they were provided. No evidence was called on the part of the first respondent to refute the appellant's testimony. Such an important omission was missed by both courts below.

In our judgment, two consequences inevitably followed when the first respondent who was fully conversant with the facts studiously refrained from giving evidence. In the first place, the evidence given by the appellant ought to have been presumed to be true. As Elphinstone CJ said in *Wasakah Singh v. Bachan Singh* [1931] 1 MC 125 at p. 128:

> If the party on whom the burden of proof lies gives or calls evidence which, if it is believed, is sufficient to prove his case, then the judge is bound to call upon the other party, and has no power to hold that the first party has failed to prove his case merely because the judge does not believe his evidence. At this stage, the truth or falsity of the evidence is immaterial. For the purpose of testing whether there is a case to answer, all the evidence given must be presumed to be true.

Now, what the trial judge did in the present case is precisely what he ought not to have done. He expressed dissatisfaction with the appellant's evidence without asking himself that most vital question: does the first defendant/respondent have a case to answer? This failure on the part of the trial judge is a serious non-direction amounting to a misdirection which occasioned a miscarriage of justice. The trial judge was at that stage not concerned with his belief of the appellant's evidence. She had given her explanation as to the discrepancies in the figures. And her evidence does not appear to be either inherently incredible or inherently improbable. In these circumstances, it was the duty of the judge to have accepted her evidence as true in the absence of any evidence from the first respondent going the other way. He however failed to direct himself in this fashion, thereby occasioning a serious miscarriage of justice.

The second consequence is that the court ought to have drawn an adverse inference against the first respondent on the amount of the appellant's contribution to the purchase price as well as the existence and the terms of the mutual understanding or agreement

A that she had with the first respondent. Where, as here, the first respondent being a party to the action provides no reasons as to why she did not care to give evidence, the court will normally draw an adverse inference. See *Guthrie Sdn Bhd v. Trans-Malaysian Leasing Corp Bhd* [1991] 1 CLJ 9; [1991] 1 CLJ (Rep) 155. See also, *Jaafar Shaari & Siti Jama Hashim v. Tan Lip Eng & Anor* [1997] 4 CLJ 509 where Peh Swee Chin FCJ said: "The respondents had chosen to close the case at the end of the appellants' case. Although they were entitled to do so, they would be in peril of not having the evidence of their most important witness and of having an adverse inference drawn against them for failing to call such evidence should the circumstances demand it."

There are two other authorities that are of assistance on the point. In *Wisniewski v. Central Manchester Health Authority* [1998] PIQR 324, Brooke LJ when delivering the judgment of the Court of Appeal quoted from a number of authorities including the following passage from the speech of Lord Diplock in *Herrington v. British Railways Board* [1972] AC 877:

> The appellants, who are a public corporation, elected to call no witnesses, thus depriving the court of any positive evidence as to whether the condition of the fence and the adjacent terrain had been noticed by any particular servant of theirs or as to what he or any other of their servants either thought or did about it. This is a legitimate tactical move under our adversarial system of litigation. But a defendant who adopts it cannot complain if the court draws from the facts which have been disclosed, all reasonable inferences as to what are the facts which the defendant has chosen to withhold.

Brooke LJ then went on to say this:

> From this line of authority, I derive the following principles in the context of the present case:
>
> (1) In certain circumstances, a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.
>
> (2) If a court is willing to draw such inferences, they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.

(3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue. A

(4) If the reason for the witness's absence or silence satisfies the court, then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified. B C

The other case is *Crawford v. Financial Institutions Services Ltd (Jamaica)* [2005] UKPC 40, where Lord Walker of Gestingthorpe when delivering the Advice of the Privy Council said:

It is well settled that in civil proceedings, the court may draw adverse inferences from a defendant's decision not to give or call evidence as to matters within the knowledge of himself or his employees. D

[6] Sarkar on Evidence 16th edn at p. 1837 states: E

It is the bounden duty of a party personally knowing the whole circumstances to give evidence and to submit to cross examination. Non-appearance as a witness would be, the strongest possible circumstance to discredit the truth of his case *Gurbaksh v. Gurdial, AIR* [1927] PC 230. F

[23] Another case of a similar nature to this case is the Court of Appeal's decision in *Raja Lob Sharuddin Raja Ahmad Terzali & Ors v. Sri Seltra Sdn Bhd* [2008] 2 CLJ 284, where Azmel Maamor JCA in delivering the judgment said as follows: G

No inspection had been done by any of the Defendant witnesses. On the other hand PW1, an engineer, had inspected all the 45 houses before preparing his engineering report and had taken the photographs of the defects. PW1's evidence had been supported by the evidence of PW2. For the learned Judge to decide in favour of the Defendant relying entirely on PW2's comment on the photographs produced would be completely against the overwhelming weight of evidence adduced for the Plaintiffs and such we find it very difficult to accept. Short of making actual inspection of the defects to the houses, it would be highly unconceivable how any could make a conclusion that a report on H I

A defects based on full inspection could be rejected by the court. What the Defendant should have done was to call a witness with engineering qualification to inspect the Plaintiffs' houses and produce a report disputing PW1's report on the defects. In such a situation the learned Judge would be in a better situation which report to accept. In the circumstances of this case we could not find any reason why PW1's report should be rejected. It is in evidence that PW1 was a qualified civil engineer, registered with Lembaga Jurutera Malaysia and had 25 years experience as an engineer specializing in the field of engineering consultancy on building matter. With such credentials and in the absence of any engineering report produced by the Defendant the learned Judge had misdirected himself when he rejected the report of PW1.

[24] The defendants also have chosen not to rebut the principles stated in the cited cases but chose to rely on the terms of the sale and purchase agreement and they are:

(a) The exclusive jurisdiction of the defendant's architect to determine whether there were defects in that, the Architect is the arbitrator of disputes between the plaintiffs and the defendant;

(b) Reliance on the unchallenged architect's certificate;

(c) Pursuant to cl. 23(1) of the sale and purchase agreement, the plaintiffs are precluded from claiming damages in that they have renovated their houses.

[25] I shall now deal with the proposition that the defendant's architect is the arbitrator of disputes between the plaintiffs and the defendant. Counsel for the defendant relies on cl. 23 of the sale and purchase agreements and it reads as follows:

(1) Where any defect in the said Property becomes known within a period of six months from the expiry of fourteen (14) days from the date of notice from the Developer that the Certificate of Fitness for Occupation to the said Property has been issued (hereinafter referred to as "the said Notice", the Developer shall at its own expense make good the defect. It is hereby expressly agreed that where the Purchaser has carried out renovations relating to the said Property in any way whatsoever within the said six (6) calendar months after the expiry of fourteen (14) days from the date of the said Notice, the Developer shall not be responsible to remedy any alleged defect whatsoever thereof.

(2) For the purposes of this Clause, "defect" includes any shrinkage structural defect or other defect in the said Property which is due:

(a) to defective workmanship or material; or

(b) to the said Property not having been constructed in accordance with the Building Plans as approved by the Appropriate Authority or in accordance with the specifications as described in Fifth Schedule hereof.

(3) In the event of any dispute arising as to whether any defect falls within the scope of this Clause and as to whether the Developer is bound to make good the same, the decision of the Developer's architect shall be final and binding on the parties hereto.

(4) Upon the expiry of the six (6) months' period, if the Developer failed to remedy any defect, shrinkage or other fault in the said Property, the Housing Controller reserves the right to utilize the deposit money to make good the reported defect in the said Property."

[26] Counsel also relies on Chapter Twelve of *"The Law Relating To Building Contracts Cases & Materials"* by Chow Kok Fong (Quins, Malaysia & Singapore 1980) on "Duties of the Architect" which states:

> The architect under a building contract serves as an agent of the employers. He is engaged primarily to ensure that the works are executed effectively and economically. However he owes a duty to discharge his responsibilities fairly and professionally as between the parties to the building contract. It was thought for a long time that these features of the architect's position confer on the architect a dual capacity; firstly, as an agent of the employer and secondly as a "quasi arbitrator" between the parties. The point was finally settled in the House of Lords case of *Sutcliffe v. Thackrah* [1974] AC 727 where it was ruled that an architect under a building contract is the employer's agent throughout notwithstanding the requirement on him to act in a fair and professional manner in the discharge of his duties.

[27] Relying on the above, counsel for the defendants then submits that the plaintiffs ought to have invoked cl. 23 of the sale and purchase agreements by calling upon the architect to adjudicate on the disputes between the parties and since they did not, the plaintiffs are barred from disputing the conclusiveness of the defendants' architect certificates.

[28] In rebuttal, the plaintiffs relies on the commentaries in *Keating on Building Contracts,* 7th edn (2001), at pp. 135 and 136 which states as follows:

> Binding and conclusive certificates.
>
> The decision of an architect as stated in his certificate may be as binding and conclusive between the parties as if it were an award. An architect in granting ordinary certificates in building contracts is not an arbitrator and he cannot be compelled to state his reasons. He may not be obliged to observe the rules of natural justice by giving both parties a hearing or other opportunity to state their case. It has been said that the object of making the architect's decision in a final certificate binding and conclusive is to have the benefit of his skill and knowledge as an independent man to decide what is finally due between the parties without recourse to the enormous expenses and trouble often involved in judicial proceedings. This does not appear to reflect current judicial thinking or the approach of the legislature.

[29] I agree with counsel for the plaintiffs for the simple reason that there is no specific clause in the sale and purchase agreements providing for disputes to be referred to arbitration. In any event, it would be an affront to the principle of natural justice and fairness if the defendant's architect is to act as an arbitrator as he, so to speak, is on the payroll of the defendant. Hence, it is my view that the plaintiffs are fully entitled to challenge the defendant's architect certificates in this proceeding. Unfortunately, the defendant have chosen not to call the architect to rebut the plaintiffs' evidence, hence they suffer the consequences of this court, drawing adverse inference against them. The defendant's architect is a person who has intimate knowledge of the status of the houses and the most appropriate person to rebut the evidence of PW1 and PW2.

[30] As for the defendant's submission that the plaintiffs are prohibited by cl. 23 from claiming, in view of the fact that renovations to the house have been done by the plaintiffs, I agree with the counsel for plaintiffs that part of the provision contravene r. 12(1)(q) of the Housing (Control and Licensing Of Developers) Rules 1980 which states as follows:

> Every contract of sale shall be in writing and shall contain within its terms and conditions provisions to the following effect, namely:

(q) provisions binding on the licensed housing developer that he shall undertake to remedy any defect, shrinkage or other fault in the housing accommodation erected for the purchaser which defect, shrinkage or other fault may become apparent within a period of six calendar months after the date of delivery of vacant possession to the purchaser by the licensed housing developer;

[31] My reason is as expressed by Azmel Maamor JCA in *Raja Lob Sharuddin Raja Ahmad Terzali & Ors v. Sri Seltra Sdn Bhd (supra)* which is as follows:

The question that we have to determine is whether this cl. 23 should be construed and applied against purchasers of houses. To do that it would be incumbent upon us to trace the purpose for which cl. 23 was originally created. It began with the passing of the Housing Development (Control and Licensing) Act 1966 and the regulations made thereunder. In 1982, the Housing Developers (Contract and Licensing) Regulations came into force. And reg. 12(1) of Regulation 1982 provides that every contract of sale for the sale and purchase of a housing accommodation together with the sub-divisional portion of land appurtenant thereto shall be in the form as prescribed in Schedule E. Regulation 12(1) further provides that no amendment to any such contract of sale shall be made except on the ground of hardship or necessity and with the prior approval of the Controller. In other words, all the provisions in the sale and purchase agreements are actually statutory requirements which must be strictly complied with. Clause 23, in particular, is meant to be an additional protection for house buyers, without affecting or limiting their rights under the common law. This was the ruling made by the Privy Council in *City Investment Sdn Bhd v. Koperasi Serbaguna Cuepacs Tanggungan Bhd* [1987] 1 LNS 62; [1988] 1 MLJ 69. In that case Lord Templeman said:

> But the Act of 1966 and the Rules were designed to improve and supplement common law remedies and do not expressly or by implication deprive a litigant of a contractual remedy which is not dealt with under the Rules

[32] Another case of high authority is the Federal Court decision in *Teh Khem On & Anor v. Yeoh & Wu Development Sdn Bhd & Ors* [1996] 2 CLJ 1105, where Peh Swee 3 Chin FCJ said:

Again, the vendor/builder and in fact, other defendants, all have joined in a common submission by way of defence that the damage occurred after the defect liability period mentioned in

cl. 23 of P1. I share the view espoused by Lord Denning in *Hancock & Ors v. Bul Brazier Ltd* [1966] 2 All ER 901; [1966] 1 WLR 1317, to the effect that such clause similar to cl. 23 in our instant appeal about making good structural defects discovered within six months would not take away the right to sue in respect of such defects which were not discoverable with such six months, and that further in regard, those defects discovered within the six months, the provision of an express remedy of making good the same defects will not *ipso facto* take away the rights of any purchaser which normally follow at common law in the case of a breach of contract. It is pertinent to mention that our cl. 23 provides for 12 months instead of six months. The same principles would apply. Thus the said line of defence also fails.

[26] On the basis of the ruling made by the above two cases the reliance of the Defect Liability Period as a defence by the defendant should be totally rejected. Here again the learned judge had misdirected himself in law.

[33] For reasons stated above, I accept the evidence of PW1 and PW2 as the defendant has not shown me that their evidence is inherently incredible and accordingly find that the plaintiffs have proved on the balance of probability their claim of the defendants' liability.

Quantum Of Damages

[34] The plaintiffs have made two types of claims:

(a) Quantifiable loss and

(b) Unquantifiable loss.

[35] The relevant law on the damages to be recovered for breaches of contract is governed by s. 74 of the Contracts Act 1950 which reads as follows:

74. Compensation for loss or damage caused by breach of contract.

(1) When a contract has been broken, the party who suffers by the breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from the breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

(2) Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach. A

(3) Compensation for failure to discharge obligation resembling those created by contract.

When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default as if the person had contracted to discharge it and had broken his contract. B

[36] In the often quoted case of *Hadley v. Baxendale* [1854] 156 ER 145; 9 Ex Ch 341 the court held that: C

Where two parties have made a contract which one of them has broken the damages which the other party ought to receive in respect of breach of contract should be such as may fairly and reasonable be considered as either arising naturally, ie, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it. D

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[37] I have also no doubt that diminution in value as claimed in this case is within the definition set out in *Hadley* case. As pointed out by counsel for the plaintiffs, the Singapore case of *Mahtani & Ors v. Kiaw Aik Hang Land Pte* [1995] 1 SLR 168 had held that the innocent party can claim for diminution of value as damages resulting from breach of the defendant/developer in failing to complete the flat in a good and workmanlike manner. The learned JC Judith Prakash (as she then was) relied on the judgment of Lord Denning in *Applegate v. Moss* [1971] 1 All ER 747 and said as follows: F G

It appears from Emden's Construction Law that whilst there are four alternative bases on which the damage sustained by a party who has been injured by the failure of a developer or builder to build or complete a structurally sound and defect free building may be assessed, the general rule is that the correct basis is the cost of rectifying or completing the work. Such cost is assessed at the time it was reasonable for such party to carry out the rectification work. The Plaintiffs contend that that basis is inapplicable in the H

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present circumstances. If it were used, they would recover nothing since the flat was sold before any rectification works were commenced. The plaintiffs say that their loss should instead be assessed on the basis of the diminution in the value of the flat by reason of the defects.

[38] I see no reason to disagree with what is stated there. With that I now deal with the quantum of claims.

Quantifiable Loss

[39] In view of the withdrawal of this action by 5th, 8th, 9th, 10th, 11th, and 29th plaintiffs, the claim of the remaining plaintiffs is RM1,065,793. In proving this claim, the plaintiffs rely on exh. P5 which is authored by PW3 who is a professional registered quantity surveyor of 28 years experience. His assessment is based on exhs. P1, P2, P3, P4 and P9. The evidence of PW3 and his report had not been seriously challenged by the defendants and applying principles set out in above cases, I accept the quantum of damages as calculated by PW3.

Unquantifiable Loss

[40] It is the evidence of PW2 that the plaintiffs' houses were built with defects which cannot be remedied unless they are completely demolished and rebuild from ground zero. This piece of evidence was never challenged and again applying established principle alluded to earlier, the court accepts it.

[41] The unqualifiable loss according to the plaintiff is the loss of amenity value plus the maintenance costs due to (1) under strength concrete; (2) undersized steel bars; (3) moisture ingress due to lack of damp proof course in brick walls and water proofing membrane underneath ground slabs; (4) ground settlement problems; (5) absence of exmet reinforcement in brick walls.

[42] In proving the quantum of loss, the plaintiffs rely on the evidence of PW4 who authored exh. P6 which counsel for the plaintiffs had summarized accurately as follows:

1. There has been an average appreciation of Market Value for residential properties of between 30% and 35% between the Years of 2002 and 2009.

2. PW4 had adopted 30% as a fair appreciation rate in Market Value for an average residential property in the vicinity of Taman Bukit Saujana between the Years of 2002 and 2009.

3. Investigation of the transacted prices of houses within Taman Bukit Saujana reveals that prices have remained more or less stagnant since the times of purchase up to now.

4. Only houses with minor improvements or in their original state as those delivered by the developer were selected for the purpose of the analysis.

5. The houses in Taman Bukit Saujana, especially those in their original condition, have not appreciated in value. Hence, when considered in the light of the general residential sector in Kota Kinabalu, the houses in Taman Bukit Saujana have lagged behind by a margin of 30% in terms of appreciation in Market Values.

6. The non-appreciation in Market Values was due to the defective buildings especially since the problem had been published in the local newspapers (Appendix E in Exhibit P6)

7. In arriving at the diminutions in Market Values of the houses in Taman Bukit Saujana, PW4 adopted a 30% rate over the original prices, on the assumption that had those houses been built according to specifications and without defects, they should reasonably be able to command 30% - higher Market Values today.

[43] In measuring damages, Judith Prakash JC in *Mahtani* case refers to what Lord Denning said in *Applegate* case and it is this:

> Measuring damages by having regard to the adverse effect which the defects have had on the value of the property concerned is an appropriate basis of assessment in a situation where it is unreasonable to require the defects to be remedied. For example, where the building is so defective as to be incapable of economic repair, the court will award the market value of that building as it would have been had it been sound. This principle was laid down by the English Court of Appeal in 1. [*Applegate v. Moss* [1971] 1 All ER 747] There, the defendants had in 1957 sold a house in the course of erection to the plaintiff. In 1965 it was discovered that the house was unsaleable, irreparable, and dangerous. In the Plaintiff's action against the defendants for not building the house in accordance with the plans and specifications, the trial judge held

A that the cause of action arose in 1957 and, as at that time, the building was worth [sterling pounds] 1,900, the correct award was for that amount, plus interest from 1957 onwards. On appeal, the award was increased to [sterling pounds] 2,900 being the value of the house in 1965. As explained by Lord Denning MR (At p. 414), the right method of assessing the damage was as follows:

> If the defects had not been so serious, and the house could have been repaired at a reasonable cost, the damages would be the cost of repair at the date when in 1965 the breach was discovered. ... But in 1965 it was not a economical proposition to repair the house. It would have cost too much to underpin it. The only thing was to pull it down. In these circumstances, it seems to me that we should apply the general principle that the party injured by the breach should be put into as good a position, as far as money can do it, as he would have been if there had been no breach. If this house had been properly built, it would have been worth [sterling pounds] 2,900 in 1965 when the breach was discovered. That is the proper figure of damage.

[44] PW, in his assessment of quantum, applies a diminution of value of 30% and applying the guideline by Lord Denning, I see no error in PW2's calculation.

Cost Of Investigation

[45] This item of claim amounts to RM157,000 made up as follows:

1. For expert witness PW1 (architect) of Arkitek Summaz: RM53,508.
2. For the expert witness PW2 (Engineer) of Sabar Engineering Sdn Bhd - RM34,000.
3. For the expert witness PW3 (Quantity Surveyor) of JUBM Sdn Bhd - RM16,540.
4. For the expert witness PW4 (Registered Valuer) of CH William Talhar & Wong - RM33,850.

[46] Again, there is no rebuttal by the defendants of these costs and since these fees in my view are reasonable professional fees, I accept them as legitimate expenditure on the part of the plaintiffs in pursuing this case.

[47] Before I leave this area of discussion, I should comment on the defendant's contention that the renovation carried by the plaintiffs to their houses should have an effect on the valuation of the quantum of damages. With respect, that is an assertion though logical is not supported by any evidence. The reality of thing is that it appears that the relevant authority does not view these renovations as a major concern. In fact it appears that these illegal structures can be legalized with a subsequent application for approval. This, in short is the evidence of PW10 who is the engineer of DBKK. Of course again there is no evidence in court to show that DBKK had required illegal structures on houses to be dismantled in Kota Kinabalu. In another word, subsequent purchasers of these renovated houses are not subject to any risk that DBKK or other relevant authorities may require them to dismantle the illegal structures. That being the case, I cannot accede to the defendant's contention.

[48] I shall now deal with some of the side issues raised by the defendant and they are:

Plaintiffs' Burden Of Proof

[49] The defendant submit that the plaintiffs had failed to discharge their burden of proof as only four plaintiffs had testified and had use a joint affidavit for the rest of the plaintiffs. With respect to this, there is no merit in the contention as the evidence of the witnesses called by the plaintiffs was more than adequate to prove that the plaintiffs' had defects as alleged by them. The experts who gave evidence in court had inspected each individual houses to prepare their reports, hence the testimony of the other plaintiffs is not necessary. In any event, the evidence required by the court is that of technical nature which the plaintiffs would not be able to give.

A **Credibility Of PW2**

[50] I have read the submission of the plaintiffs (p. 60 of encl. 219). On this point raised by the defendant and in my view, their counsel had adequately rebutted the same. Accordingly I find
B no merit on this point.

Other Issues Not Raised In Defendant's Submission

[51] It is the court's view that when issues raised during the trial are not contained or commented or relied on in the closing
C submission, the court is entitled to treat them as abandoned. My view is based on the fact that our courts' system is premised on an adversarial system which places the burden on the advocates to prosecute their clients' respective position and when counsel does not submit on issues raised during the trial, it can only mean
D that they do not want the court to consider that facet of the case. Hence I will not deliberate on these issues. In any event, the plaintiffs in their submission at pp. 62-73 had correctly covered all the 'not raised' points.

E **Conclusion**

[52] For all the reasons set out above, I enter judgment for the plaintiffs in the following manner:

(a) LAD	RM 305,681.67
F (b) Claim for damages for breach of contract:	
(i) Quantifiable losses - RM1,065,793	
(ii) Unquantifiable Losses - RM3,083,000	RM4,148,793
G (c) Costs of Investigation:	RM 137,989
Total:	RM4,592,372.67

(d) Interests at the rate of 8% per annum from the date of this
H judgment to the full settlement of the judgment sum.

(e) Costs to the plaintiffs to be taxed unless agreed.

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[53] As a closing remark, housing developers in the State or for that matter in the country must realize that the majority of purchasers of houses are first home buyers and they utilize their life saving to realize their dreams of owning their home. And in doing so, they enter into a lifelong commitment of repaying the housing loan. These purchasers purchase their houses relying on the representation of the developers that the houses will be built with good workmanship and materials and the last thing they expect is to take possession of houses which are defective and requiring massive remedial works. In this case, legal action had to be taken which made the situation worse for the plaintiffs. As in other industries, the building industry must embrace its social responsibility of ensuring that it is respected by the society at large. This can be only done by not being driven with mindset of 'profit at any costs'.

Order accordingly.